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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COPELCO CAPITAL, INC,

No C 98-1357 VRW

Plaintiff/Counterdefendant,

ORDER

v

BRAZILIAN CONSULATE GENERAL, et  
al,

Defendants/Counterclaimants.

\_\_\_\_\_/

Before the court is plaintiff Copelco Capital, Inc's (Copelco) motion for an order allowing it to levy the assets of defendant Brazilian Consulate General (Consulate). Doc #169. Consulate filed its opposition to this motion on March 9, 2005. Doc #175. On April 22, 2005, the United States Department of Justice appeared, pursuant to 28 USC § 517, to attend to the interests of the United States by filing a statement in support of Consulate's opposition. Doc #187. The court heard oral argument on May 26, 2005. Very helpful and thoughtful guidance was offered

1 by Copelco's counsel and by Rupa Bhattacharyya, representing the  
2 United States. Having carefully considered the arguments of  
3 counsel, and the applicable federal law, the court DENIES Copelco's  
4 motion.

6 I

7 The court, the parties and the United States are quite  
8 familiar with the facts of this case. In July 1997, Consulate  
9 acquired a Konica copy machine for use in its San Francisco office.  
10 Through a finance lease agreement, Consulate did not have to pay  
11 Konica cash for the copier. Konica subsequently assigned the lease  
12 to Copelco. Consulate welched on its contract, however, and has  
13 failed to make any payments to Copelco pursuant to the lease.  
14 After six years of litigation surrounding Consulate's undiplomatic  
15 refusal to honor its contract, on June 18, 2004, Copelco obtained a  
16 judgment against Consulate in the amount of \$38,750.11. Doc #160.  
17 It is worth noting that the actual value of the copier is only  
18 \$8,196.52; the additional \$30,553.59 in Copelco's judgment  
19 represents the attorney fees and interest incurred during this  
20 rather absurdly prolonged litigation.

21 After five months and no indication from Consulate that  
22 it intended to pay any portion of the judgment, Copelco obtained a  
23 writ of execution from the Clerk of this court, submitted the writ  
24 to the United States Marshal (Marshal) and requested execution of  
25 Consulate's bank account located at the Citibank International  
26 Banking Center (Citibank) in San Francisco. Doc #170. The Marshal  
27 complied and the Citibank account was levied on November 9, 2004.  
28 Subsequently, counsel for Copelco and Consulate apparently agreed

1 that the writ of execution should be recalled for failure to comply  
2 with 28 USC § 1610(c), which prohibits attachment or execution  
3 until a hearing has been conducted by the court. Accordingly, on  
4 December 16, 2004, Copelco voluntarily released the Citibank  
5 account. Doc #166, Ex B (Release Letter).

6 On January 14, 2005, Copelco filed the present motion  
7 requesting the court to find, pursuant to 28 USC § 1610(c), that a  
8 reasonable period of time has elapsed following the entry of the  
9 judgment against Consulate and thus an order allowing Copelco to  
10 levy the assets of Consulate is warranted. Doc #169 (Pla Mot).  
11 Copelco has furthered clarified that its motion is "directed  
12 specifically toward [the] Citibank account that was previously  
13 levied." Doc #190 at 1. Consulate opposes the motion, asserting  
14 that its Citibank account enjoys diplomatic immunity from  
15 attachment pursuant to the Vienna Convention on Consular Relations  
16 of 1969 (VCCR). Doc #175. Alternatively, Consulate asserts that  
17 its bank accounts are immune from attachment under the Foreign  
18 Sovereign Immunities Act (FSIA), 28 USC § 1602 et seq. Id. As  
19 mentioned above, the United States has filed, in essence, a  
20 memorandum amicus curiae in support of Consulate.

21  
22 II

23 *Vienna Convention*

24 A

25 "Believing that an international convention on diplomatic  
26 intercourse, privileges and immunities would contribute to the  
27 development of friendly relations among nations, irrespective of  
28 their differing constitutional and social systems," the Vienna

1 Convention on Diplomatic Relations (VCDR) was ratified in 1961.  
2 Vienna Convention on Diplomatic Relations, [1961] 23 UST 3227, TIAS  
3 No 7502. The VCDR provided diplomatic immunity to ministers and  
4 diplomats sent from a "sending" signatory country to a "receiving"  
5 signatory country to head a "mission" (e g, negotiations, promoting  
6 relations and developments). In 1969, "believing that \* \* \*  
7 consular relations" would benefit from a similar convention, the  
8 VCCR was enacted to provide diplomatic immunity to consuls of a  
9 "sending" signatory who reside in a foreign "receiving" signatory  
10 country to represent the commercial interests of the citizens of  
11 the sending signatory. Vienna Convention on Consular Relations,  
12 [1969] 21 UST 77, TIAS No 6820. Although their Articles are  
13 numerically different, both Vienna Conventions employ the same  
14 substantive language throughout. It is undisputed that the United  
15 States and Brazil are signatories to both the VCDR and VCCR.

16 Of great importance to the current motion is Article 28 of  
17 the VCCR, which provides that "[t]he receiving State shall accord  
18 full facilities for the performance of the functions of the  
19 consular post." 21 UST at 96 (emphasis added); see 23 UST at 3238,  
20 Art 25 (VCDR analog) ("The receiving State shall accord full  
21 facilities for the performance of the [diplomatic] mission.").  
22

23 B

24 Consulate concedes that "neither the VCDR nor the VCCR  
25 state specifically that official bank accounts used for purposes of  
26 a foreign mission enjoy immunity from attachment." Doc #176 at 4.  
27 Consulate, however, asserts that VCCR Article 28 prohibits Copelco  
28 from attaching its Citibank account. Id.

1 Consulate argues that "[i]f the 'full facilities' to  
2 which the United States agreed to 'accord' consular immunity did  
3 not include bank accounts off the premises of the [consular post],  
4 the Consulate would have to take grossly inconvenient measures to  
5 protect its government accounts against seizures and [measures]  
6 that would severely hamper the Consulate's consular function." Doc  
7 #176 at 4. At first blush, this argument appears to stretch the  
8 words of the VCCR beyond their plain meaning. The Consulate's  
9 position, however, finds support in two district court cases. See  
10 Liberian Eastern Timber Corp v Government of the Republic of  
11 Liberia, 659 F Supp 606 (D DC 1987) (Harris, J) (hereinafter  
12 LETCO); see also Foxworth v Permanent Mission of the Republic of  
13 Uganda, 769 F Supp 761 (SD NY 1992) (Mukasey, J).

14 In LETCO, the Republic of Liberia (Liberia) granted a  
15 concession to Liberian Eastern Timber Corporation (LETCO) to  
16 harvest and exploit over 400,000 acres of Liberian timber. Ten  
17 years later, Liberia reduced this concession by almost half and  
18 later terminated the concession altogether. LETCO commenced  
19 arbitration under the Convention on the Settlement of Investment  
20 Disputes Between States and Nationals of Other States. The  
21 arbitration panel awarded LETCO \$8,793,280. LETCO then  
22 successfully obtained an ex parte order directing the entry of  
23 judgment against Liberia in the United States District Court for  
24 the Southern District of New York in the amount of \$9,076,857.25  
25 (this included interest on the arbitration award). LETCO recorded  
26 the judgment in the United States District Court for the District  
27 of Columbia and that court issued writs of attachment to Riggs  
28 National Bank and First American Bank to seize the Liberian

1 Embassy's bank accounts in an amount sufficient to satisfy the  
2 judgment. 659 F Supp at 607-08.

3           Liberia moved the district court to quash the writs of  
4 attachment, arguing that the bank accounts of the Embassy of  
5 Liberia were immune from attachment under Article 25 of the VCDR.  
6 The district court agreed. "The Liberian Embassy lacks the 'full  
7 facilities' the Government of the United States has agreed to  
8 accord if, to satisfy a civil judgment, the Court permits a writ of  
9 attachment to seize official bank accounts used or intended to be  
10 used for purposes of the diplomatic mission." 659 F Supp at 608.

11 More specifically, the court stated:

12           If the 'full facilities' to which the United  
13 States agreed to 'accord' diplomatic immunity did  
14 not include bank accounts off the premises of the  
15 mission, the Liberian Embassy either would have  
16 to take grossly inconvenient measures, such as  
17 issuing only checks drawn on a Liberian bank, or  
18 would have to run the risk that judgment  
19 creditors of Liberia would cause the accounts the  
20 Embassy holds at banks located in the United  
21 States to be seized for an indefinite length of  
22 time, severely hampering the performance of the  
23 Embassy's diplomatic functions.

24 Id.

25           The LETCO court concluded that "although no provision of the [VCDR]  
26 states specifically that official bank accounts \* \* \* enjoy  
27 diplomatic immunity from attachment \* \* \* not affording [such]  
28 diplomatic immunity \* \* \* is inconsistent with both the agreement  
set forth in Article 25 and the intention of the parties to the  
Vienna Convention." Id. While it is true that LETCO interpreted  
Article 25 of the VCDR (rather than Article 28 of the VCCR), this  
is a distinction without a difference: the language of both  
Articles is identical.

1           In Foxworth, an 80 year-old woman (Foxworth) was struck  
2 by an automobile owned by the Permanent Mission of the Republic of  
3 Uganda to the United Nations (Uganda). Foxworth suffered severe  
4 injuries to her legs as a result of the accident. 769 F Supp at  
5 762. Foxworth filed suit in the Southern District of New York and,  
6 due to Uganda's failure to appear, a judgment by default was  
7 entered against Uganda in 1991. In 1992, again receiving no  
8 objection from Uganda, the court entered final judgment in the  
9 amount of \$250,120. Id. Uganda failed to satisfy the judgment and  
10 a writ of execution was entered on a bank account held by Uganda at  
11 the Chemical Bank branch in Manhattan. "Evidently, the attachment  
12 of its bank account convinced [Uganda] that [Foxworth's] claim and  
13 the proceedings before th[e] court warranted its attention," for  
14 soon thereafter, Uganda appeared in the matter and moved to vacate  
15 the writ of execution on its bank account. Id. A representative  
16 of Uganda explained to the court that the Chemical Bank account,  
17 "the balance of which now [was] less than the outstanding judgment,  
18 [was] used for wages, allowances and travel expenses for Mission  
19 personnel and that a continued freeze would force the Mission to  
20 cease operations." Id (emphasis added). Moreover, the United  
21 States Department of State (appearing as amicus curiae) agreed with  
22 Uganda "that attachment of the account is in violation of  
23 obligations owed to \* \* \* Uganda \* \* \* because it impairs  
24 [Uganda's] ability to perform its official functions." Id  
25 (emphasis added).

26           Faced with two signatories of the VCDR agreeing that the  
27 Convention prohibited the attachment of diplomatic bank accounts,  
28 Judge Mukasey (implying that his hands were tied) held that Article

1 25 of the VCDR and its obligations to accord "full facilities" to a  
2 sending State prohibited the attachment of Uganda's bank account to  
3 satisfy Foxworth's civil judgment. Id at 763. But Judge Mukasey,  
4 explicitly stated the narrowness of his ruling:

5 [Uganda] \* \* \* is admonished that the holding  
6 of this opinion is quite narrow; that is, it  
7 holds only that attachment of [Uganda]'s bank  
8 account is in violation of the \* \* \* Vienna  
9 Convention because it would force [Uganda] to  
10 cease operations. \* \* \*. Because attachment  
11 \* \* \* will force Uganda to cease operations,  
12 [the motion to vacate] is granted.  
13 Id at 763-64 (emphasis added).

14 Consulate argues that LETCO and Foxworth, and thus the  
15 obligation of Article 28 of the VCCR, should guide the court to  
16 "accord full facilities for the performance of the functions of the  
17 consular post" by prohibiting Copelco from attaching Consulate's  
18 Citibank account. Doc #176 at 4 ("Bank accounts of diplomatic and  
19 consular posts are \* \* \* immune from attachment under the Vienna  
20 Convention") (citing LETCO and Foxworth).

21 On April 22, 2004, pursuant to 28 USC § 517, the United  
22 States filed its statement of interest in support of Consulate's  
23 above-recited immunity argument. Doc #187. In addition to  
24 repeating Consulate's arguments that Article 28 of the VCCR  
25 prohibits the levy of the Citibank account and that LETCO and  
26 Foxworth should govern the present motion, the United States makes  
27 an additional argument: "[A]ny order by the court allowing such  
28 attachment \* \* \* in light of international reciprocity, also could  
undermine efforts to protect U[nited] S[tates] diplomatic and  
consular properties located abroad." Id at 5. Most important to  
the disposition of the current motion, at oral argument the



1 attorney for the United States, Ms Bhattacharyya, eloquently  
2 described the slippery slope upon which the court would embark if a  
3 "wealthy consulate" exception to the reasoning of LETCO and  
4 Foxworth were to be created. Additionally, she presented specific  
5 and thorny problems that could arise abroad between foreign  
6 countries and United States consulates abroad. Finally, both the  
7 United States and Consulate inform the court that Copelco can  
8 potentially recover on its judgment by pursuing remedies in the  
9 courts of Brazil. Copelco admits it has not attempted to pursue  
10 available remedies in Brazil.

11 The court doubts that consulate bank account immunity  
12 necessarily flows from the VCCR. Furthermore, LETCO and Foxworth  
13 are distinguishable in important respects from the present case.  
14 Nonetheless, the court is constrained to stay its hand in light of  
15 the United States' position.

16 The court cannot improve on the words of Chief Justice  
17 Stone, speaking for the Court:

18 It is a guiding principle in determining whether a court  
19 [should grant a suggestion of immunity], that the courts  
20 should not so act as to embarrass the executive arm in  
21 its conduct of foreign affairs. In such cases the  
22 judicial department of this government follows the action  
23 of the political branch, and will not embarrass the  
24 latter by assuming an antagonistic jurisdiction. It is  
25 therefore not for the courts to deny an immunity which  
26 our government has seen fit to allow \* \* \*.  
27 Republic of Mexico v Hoffman, 324 US 30, 35 (1945)  
28 (citation and internal quotation marks omitted).

29 Aside from the desire not to embarrass the executive branch, "[t]he  
30 determination to grant (or not grant) immunity can have significant  
31 implications for this country's relationship with other nations."  
32 Wei Ye v Zemin, 383 F3d 620, 627 (7th Cir 2004). Indeed, Ms

1 Bhattacharyya spoke in depth regarding these implications. In such  
2 a case, "[a] court is ill-prepared to assess these implications and  
3 resolve the competing concerns the Executive Branch is faced with  
4 in determining whether to [provide immunity]." Id. See also  
5 Spacil v Crowe, 489 F2d 614, 619 (5th Cir 1974) ("Separation-of-  
6 power principles impel a reluctance in the judiciary to interfere  
7 with or embarrass the executive in its constitutional role as the  
8 nation's primary organ of international policy." (citing United  
9 States v Lee, 106 US 196, 209 (1882))).

10           Moreover, this deference is especially warranted in light  
11 of the fact that Copelco has not exhausted other avenues of  
12 potential remedies; it has not attempted to recover in the courts  
13 of Brazil. Refusing to accept two signatories' joint  
14 interpretation of the VCCR is not something this court should  
15 embark upon lightly even in light of the strong equities evident  
16 here. Copelco can resort to other means in attempting to recover  
17 on its judgment. Consulate's counsel has represented that this is  
18 the route by which claims against the government of Brazil are  
19 normally asserted. Further, Consulate's counsel has represented  
20 that Brazil understands its duty to honor its contractual  
21 obligations. The court -- with some reservation to be sure --  
22 accepts these representations and is loathe to suggest that a  
23 sovereign nation, such as Brazil, would do otherwise. Still,  
24 Consulate's refusal to make timely payments has almost quadrupled  
25 the amount due Copelco. The longer the debt goes unpaid, the  
26 greater the ultimate reckoning will be. Furthermore, Consulate's  
27 resting on the VCCR is not solid ground, but a quicksand.  
28 Consulates need copiers and lots of other things to perform their

1 mission; many of which must be acquired in the host country. If  
2 suppliers in those countries cannot expect to be paid and in the  
3 event of non-payment not have the normal remedies available in  
4 commercial transactions, then suppliers will simply not furnish the  
5 needed goods and services, except perhaps for cash on the barrel  
6 head. Consulate should be very wary of acquiring the reputation of  
7 a deadbeat.

8  
9 III

10 In sum, based upon the United States' representations  
11 that attachment of Consulate's Citibank account could create  
12 international discord toward United States consulates abroad and  
13 because Copelco could potentially obtain a remedy without requiring  
14 the court to attach the Citibank account, the court DENIES  
15 Copelco's motion (Doc #169) without prejudice to its renewal in the  
16 event Copelco can demonstrate that a good faith effort to seek and  
17 obtain redress through the channels that Consulate has represented  
18 will be availing in this matter has proven fruitless.

19 To be clear, the denial of Copelco's motion represents  
20 this court's deference to the executive branch regarding an issue  
21 of diplomacy; the court in no way condones Consulate's conduct.

22 The clerk is DIRECTED administratively to close this file  
23 and terminate all pending motions, subject to re-opening at any  
24 time that Copelco can demonstrate that it has been frustrated in

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1 its efforts to obtain full redress through the means Consulate has  
2 represented are proper. This closing is for the administrative  
3 convenience of the court and not intended in any way to affect the  
4 substantive or procedural rights of the parties herein.

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7 IT IS SO ORDERED.

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10 VAUGHN R WALKER

11 United States District Chief Judge  
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